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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~500.~~ 268

THE PHŒNIX INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

W. A. SLAUGHTER AND JACOB STEWART, LATE PARTNERS AS W. A. SLAUGHTER & CO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

FILED OCTOBER 25, 1870.

18.

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1 W. A. SLAUGHTER & Co.
vs.
THE PHŒNIX INSURANCE COMPANY OF HARTford, Connecticut. } 847.

Plea and proceedings before the Honorable Robert A. Hill, district judge of the United States for the district of Mississippi, at a regular term of the circuit court of the United States for the 5th judicial circuit in the southern district of Mississippi, held at Jackson, in said district, on the 1st Monday of May, in the year of our Lord one thousand and eight hundred and seventy, and in the 94th year of the independence of the United States of America.

Be it remembered that heretofore, to wit, on the 29th day of October, in the year of our Lord one thousand eight hundred and sixty-nine, The Phœnix Insurance Company of the City of Hartford, in the State of Connecticut, by Barrows and Smythe, esquires, their attorneys, filed in the clerk's office of our said court a certain transcript from the circuit court of the county of Lauderdale, in the State of Mississippi, which is in the following words and figures, to wit:

THE STATE OF MISSISSIPPI, *Lauderdale County:*

Circuit court, August term, 1869.

Be it remembered that a regular term of the circuit was begun and held in and for the county of Lauderdale, in the State of Mississippi, at the court-house thereof, in the town of Marion, on the second Monday and ninth day of August, in the year of our Lord one thousand eight hundred and sixty-nine, that being the time and place designated
2 by law for holding said court. Present and presiding, the Honorable Robert Leachman, judge of the eighth judicial circuit, district of said State of Mississippi, herein sole and presiding; E. L. Howell, esquire, district attorney for said district, herein presenting the pleas of the State of Mississippi; R. J. Moseley, sheriff of Lauderdale County.

Be it remembered that, on the 28th day of July, 1869, a process of summons was issued out of the office of the clerk of said court in the words and figures following:

THE STATE OF MISSISSIPPI, *Lauderdale County:*

To the sheriff of Lauderdale County, greeting:

We command you to summon The Phœnix Insurance Company, if to be found within your county, to be and personally appear before the honorable circuit court of Lauderdale County, next to be holden in and for said county, at the court-house, in the town of Marion, on the second Monday of August next, then and there to make answer unto W. A. Slaughter and Jacob Stewart, late partners in trade under the firm name of W. A. Slaughter & Co., of a complaint in assumpsit, damages of plaintiff five thousand dollars. Herein fail not, and have then there this writ.

Given under my hand, and seal of office attached, and issued the 28th day of July, A. D. 1869.

Teste: B. F. MOORE,
Clerk of the Circuit Court of Lauderdale County.

(Endorsed as follows:)

The sheriff will execute this writ by serving the same on E. V. Early, agent of the defendant.

EVANS, FORD, & HENRY,
3 *Plaintiffs' Attorney.*

Upon which the sheriff made the following return:

Executed by personal service upon E. V. Early, agent of the defendants, and by leaving with him a true copy of this writ.

R. J. MOSELEY, *Sh'ff*,
By L. D. BELK, *Deputy.*

Declaration.

THE STATE OF MISSISSIPPI, *Lauderdale County:*

Circuit court of said county, February term, A. D. 1869.

W. A. Slaughter and Jacob Stewart, late partners in trade under the firm name of W. A. Slaughter and Co., by attorney, complains of The Phœnix Insurance Company of the City of Hartford, in the State of Connecticut, in the county aforesaid:

For that whereas the plaintiffs, under the firm name of Messrs. W. A. Slaughter and Co., heretofore, to wit, on the 24th day of December, A. D. 1867, at, to wit, in the county aforesaid, caused to be made a certain policy of insurance, purporting thereby and containing that the said plaintiffs had paid to said defendants the sum of one hundred and twenty-five dollars; and, in consideration thereof, the said defendant, on the day and year aforesaid, at, to wit, in the county aforesaid, made, executed, and delivered to the plaintiffs their certain written policy of insurance in the words and figures following, to wit:

"PHŒNIX INSURANCE COMPANY OF HARTFORD, CONNECTICUT:

"By this policy of insurance The Phœnix Insurance Company, in consideration of the sum of one hundred and twenty-five dollars, to them in hand paid by the assured hereinafter named, the receipt whereof
4 is hereby acknowledged, do insure Messrs. W. A. Slaughter & Co. against loss or damage by fire to the amount of twenty-five hundred dollars upon the stock of m'd'se (meaning merchandise) and plantation supplies contained in the one-story framed storehouse situated on Johnson avenue, next door to Ross, Watkins & Co., in the city of Meridian, county of Lauderdale, State of Mississippi, reference to be had to assureds' application No. 2225, which is their warranty, and part hereof. And the said company hereby agrees to make good unto *to* the said assured, their executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property above specified, from the 24th day of December, one thousand eight hundred and sixty-seven, at noon, to the 24th day of December, one thousand eight hundred and sixty-eight, at noon; the amount of the loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after due notice and proofs of the same made by the assured, and received at this office, in accordance with the terms of this policy hereinafter mentioned:

"1st. This insurance may be continued for such time as shall be agreed on, provided the premium therefor is paid and endorsed on this policy, or a receipt given for the same, and it shall be considered as con-

tinued under the original representation; but in case there shall have been any change in the risk, either within itself, or by adjacent buildings, not made known to the company by the assured at the time of renewal, this policy shall be void.

5 "2nd. In case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, whether such other insurance be by specific or by general or floating policies. Reinsurance for any other insurance company to be on the basis of joint liability with said company, and, in the event of loss, this company to pay its proportion of said loss sustained by said company under their policy.

"3d. This policy may be cancelled at any time by the company, on giving written or verbal notice to that effect, and refunding or tendering a rateable proportion of the premium for the unexpired term.

"4th. If an application, survey, plan, or description of the property herein insured is referred to in this policy, such application, survey, plan, or description shall be considered a part of this contract, and a warranty by the assured; and any false representation by the assured of the condition, situation, and occupancy of the property, or any omission to make known any fact material to the risk, or an overvaluation, or any misrepresentation whatever, either in a written application, or otherwise; or if the premium shall be unpaid; or if the assured shall have or shall hereafter make any other insurance of the property hereby insured, or any part thereof, without the consent of the company written hereon; or if the above-mentioned premises shall be occupied so as to increase the risk, or become vacant and unoccupied for a period of more than thirty days, or the risk be increased by any means

6 whatever within the control of the assured, without the consent of this company endorsed hereon; or if the property be sold or transferred, or any change take place in title or possession whatever, by legal process, judicial decree, voluntary transfer, or conveyance; or if this policy shall be assigned, either before or after a loss, without the consent of the company endorsed hereon; or if the assured is not the unconditional and sole owner of the property; or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, mortgagee, lessee, or otherwise, is not truly stated in this policy; or if gunpowder, phosphorus, saltpetre, naptha, benzine, benzoin, varnish, benzole, petroleum, or crude earth oils are kept on the premises; or if camphine, burning-fluid, refined coal or earth oils are kept for sale, stored, or used on the premises in quantities exceeding one barrel at any one time, without written permission in, or indorsed upon, this policy, then, and in every such case, this policy shall be void.

"5th. This company shall not be liable for loss by theft at or after a fire, nor for any loss or damage by fire caused by means of, or during an invasion, insurrection, riot, civil commotion, or military or usurped power; nor for the loss of bills, notes, accounts, deeds, evidences of debt, or securities of property of any kind, money, bullion, jewels, plate, watches, musical or scientifical instruments, ornaments, medals, patterns, printed music, engravings, paintings, picture frames, sculpture, casts, models, or curiosities, unless particularly specified in the policy; nor in consequence of neglect or deviation from the terms or regulations of *policy* where such exist; nor for any damage caused by lightning,

7 or any explosion, unless fire ensues, and then for the loss or

damage by fire only. If the property shall be removed from a building when there is no loss by fire, the damage shall be borne by both parties in such proportion as the whole sum insured bears to the value of the property insured.

"6th. In case of loss the assured shall use their best endeavours in saving and protecting the property from damage at and after the fire. If they shall fail to do so, this company will not be liable for damages caused by such failure, and there can be no abandonment to the company of the property insured. The assured shall forthwith give notice of loss to the company, and, as soon after as possible, render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portion of all policies thereon; the actual value of the property; their interest therein; for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, were used; when and how the fire originated; and shall also produce a certificate, under the hand seal of a magistrate, notary public, or commissioner of deeds, (nearest to the place of the fire not concerned in the loss as a creditor or otherwise, nor related to the assured,) stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has without fraud sustained loss on the
8 property insured to the amount which such magistrate, notary public, or commissioner of deeds shall certify; and the assured shall, if required, submit to an examination under oath by any person appointed by the company here, and, if it be deemed necessary by the company, to a second examination, and subscribe to such examination when reduced to writing; and shall also produce their books of accounts and other vouchers, and all property hereby insured, whether damaged or not damaged; and shall also produce certified copies of all bills and invoices, where the originals have been lost, and exhibit the same for examination to any person named by the company. Damage to property not totally destroyed (unless the amount of said damages is agreed upon between the insured and the company) shall be appraised by disinterested men, mutually chosen by the assured and the company; and the company reserves the right to take the articles damaged at their appraised value. When personal property is damaged, the assured shall forthwith cause it to be put in the best order possible, properly arranged, and make an inventory thereof, naming the quantity and cost of each article, and upon each article the damage shall be separately appraised, and the detailed report of the appraisers, in writing, shall form a part of the proofs hereby required, *and* half of the appraisers' fees to be paid by the company. In case of loss of property held in trust or on commission, or if the interest of the assured be other than entire and sole ownership, the names of the respective owners shall be set forth, with their respective interests therein certified to by them. If this policy is made payable, in case of loss, to a third
9 party, or held as collateral security, the proof of loss shall be made by the party insured; and until such proofs, declarations, and certificates are produced, and examinations and appraisals permitted, the loss shall not be payable. All fraud, or attempt at fraud, or false swearing, on the part of the assured, shall cause a forfeiture of all claim under this policy.

"7th. In case differences shall arise touching any loss or damages, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to arbitrators mutually chosen,

whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy; and provided further that shall be optional with the company to repair, rebuild, or replace the property lost or damaged with other of like kind and quality, within a reasonable time, giving notice of their intention so to do within thirty days after receipt of proofs herein required; and, in case this company elect to rebuild, the assured shall, if required, furnish plan and specifications of the building destroyed.

"8th. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustained in any court of law or chancery unless such suit or action shall be commenced within twelve months next after the loss shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken as conclusive
10 evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding.

"This policy shall not be valid until countersigned by the duly authorized agent of the company at Meridian, Mississippi."

And by a certain endorsement, thereon written it was declared that said policy would expire on the 24th day of December, A. D. 1868; and plaintiffs aver that the said policy of insurance was to continue and remain in full force until the 24th day of December, A. D. 1868, at noon, as by the said policy of insurance and endorsement thereon, reference being thereunto had, will more fully and at large appear.

And thereupon afterwards, to wit, on the 24th day of December, A D. 1867, in said county, in consideration that the said plaintiffs, at the instance and request of the said defendant, had paid the said defendant the sum of money in the said policy of insurance mentioned, and had then and there undertook and faithfully promised the said defendant to perform and fulfil all things in the said policy of insurance contained on the part of and behalf of the insured to be performed and fulfilled, the said defendant undertook, and then and there promised the said plaintiffs, that he, the said defendant, would become and be an insurer to the said plaintiffs of the said sum of two thousand five hundred dollars upon the said stock of merchandise and plantation supplies in the said storehouse in the said policy of insurance mentioned, and would perform and fulfil all things in the said policy of insurance mentioned, on their part and behalf as such insurer of the *of the*
11 said sum of twenty-five hundred dollars, to be performed and fulfilled; and the said defendants then and there became and was an insurer to the said plaintiffs, and then and there, by H. Kellogg, president, W. B. Clarke, secretary, and countersigned by E. V. Early, their agent at Meridian, Mississippi, duly subscribed the said policy of insurance as such insurer of the said sum of twenty-five hundred dollars upon the said stock of merchandise and plantation supplies in the said storehouse in the said policy in that behalf mentioned.

And the said plaintiffs further saith that heretofore, to wit, on the twenty-fourth day of December, A. D. 1867, at, to wit, in the county aforesaid, divers goods, merchandise, and plantation supplies of great value had been and were in the said storehouse, in the said policy of insurance mentioned, to be therein kept, for sale, barter, and exchange, to wit, in Meridian, in the county aforesaid; and that the said plaintiffs were then and there, and from thence continually afterwards until and

at the time of the loss hereinafter mentioned, *were* the owners of the said stock of merchandise and plantation supplies in the said policy of insurance mentioned, and so, in the said storehouse as aforesaid, to a large value and amount, to wit, to the amount and value of all the monies by them ever insured or caused to be insured thereon, to wit, at Meridian, county aforesaid.

And the said plaintiffs in fact further sayeth, that heretofore, to wit, on the day of , A. D. 1868, the said storehouse with
12 the said stock of merchandise and plantation supplies were destroyed and consumed by fire, and thereby the said stock of merchandise and plantation supplies became and were wholly lost to the said plaintiffs, of all which said several premises the said defendants afterwards, to wit, on the day and year last aforesaid, to wit, in the county aforesaid, had notice, and was then and there requested by the said plaintiffs to pay them the said sum of twenty-five hundred dollars, so by him insured as aforesaid, and which said sum the said defendant then and there ought to have paid, according to the form and effect of the said policy of insurance and his said promise and undertaking by him made as aforesaid.

And whereas the said defendant afterwards, to wit, on *on* the day and year last aforesaid, was indebted to said plaintiffs in the further sum of twenty-five hundred dollars for money them paid by the said plaintiffs, for the use of the defendant, at his request; and in the further sum of twenty-five hundred dollars for money then received by the defendant for the use of the plaintiffs; and in the further sum of twenty-five hundred dollars for money found to be due to the plaintiffs on an account then stated between them; and the defendant afterwards, on the day and year aforesaid, in consideration of the premises respectively, promised the plaintiffs to pay them the said several monies on request; yet the defendant hath disregarded his promises, and hath not paid any of the said monies or any part thereof, to the damage of the plaint-
13 iffs five thousand dollars; and therefore they bring this suit.

EVANS, FORD & HENRY,
Plaintiffs' Attornies.

Copy of policy.

By this policy of insurance The Phœnix Insurance Company, in consideration of one hundred and twenty-five dollars to them in hand paid by the assured hereinafter named, the receipt whereof is hereby acknowledged, do insure Messrs. W. A. Slaughter and Company against loss or damage by *by* fire, to the amount of twenty-five hundred dollars, upon the stock of m'd'se and plantation supplies contained in the one-story framed storehouse, situated on Johnson avenue, next door to Ross, Watkins and Co., in the city of Meridian, county of Lauderdale, State of Mississippi, reference to be had to assured' application No. 2225, which is their warranty, and part hereof; and said company hereby agrees to make good unto the said assured, their executors, administrators, and assigns, all such immediate loss and damages, not exceeding in amount the sum insured, as shall happen by fire to the property above specified, from the 24th day of December, one thousand eight hundred and sixty-seven, at noon, to the 24th day of December, one thousand eight hundred and sixty-eight, at noon, the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, to be paid sixty days after due notice and proofs of the same is made by the assured, and received at

this office, in accordance with the terms of this policy hereinafter mentioned:

1st. This insurance may be continued for such further time as
14 shall be agreed on, provided the premium therefor is paid and endorsed on this policy, or a receipt given for the same, and it shall be considered as continued under original representation; but in case there shall have been any change in the risk either within itself or by adjacent buildings, not made known to the company by the assured at the time of the renewal, this policy shall be void.

2nd. In case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, whether such other insurance be by specific or by general or floating policies. Reinsurance for any other insurance company to be on the basis of joint liability with said company, and, in the event of loss, this company to pay its proportion of said loss sustained by said company under their policy.

3rd. This policy may be cancelled at any time by the company on giving written or verbal notice to that effect, and refunding or tendering a rateable proportion of the premium for the unexpired term.

4th. If any application, survey, plan, or description of the property herein insured is referred to in this policy, such application, survey, plan, or description shall be considered a part of this contract and a warranty by the assured, and any false representation by the assured of the condition, situation, or occupancy of the property, or any omission to make known any fact material to the risk, or any overvaluation or any misrepresentation whatever, either in a written application
15 or otherwise; or if the premium shall be unpaid; or if the assured shall have, or shall hereafter make, any other insurance on the property insured, or any part thereof, without the consent of the company written hereon; or if the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied for a period of more than thirty days, or the risk be increased by any means whatever within the control of the assured, without the assent of the company endorsed hereon; or if the property be sold or transferred, or any change shall take place in title or possession, whether by legal process, judicial decree, voluntary transfer, or conveyance; or if this policy shall be assigned, either before or after loss, without the consent of the company indorsed hereon; or if the assured is not the unconditional or sole owner of the property; or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, mortgagee, lessee, or otherwise, is not truly stated in this policy; or if gunpowder, phosphorus, saltpetre, naptha, burning fluid, refined coal or earth oils are kept for sale, stored, or used on the premises, in quantities exceeding one barrel at any one time, without written permission in, or endorsed upon, this policy, then, and in every such case, this policy shall be void.

5th. This company shall not be liable for loss by theft at or after a fire; nor for any loss or damage by fire caused by means of or during an invasion, insurrection, riot, civil commotion, or a military or usurped power; nor for the loss of bills, notes, accounts, deeds, evidences of debt, or securities of property of any kind, money, bullion, jewels, plate, watches, musical or scientific instruments, ornaments, medals,
16 patterns, printed music, engravings, paintings, picture frames, sculpture, casts, models, or curiosities, unless particularly specified

in the policy; nor in consequence of any neglect or any explosion, unless fire ensues, and then for the loss or damage *or damage* by fire only. If the property shall be removed from a building where there is no loss by fire, the damage shall be borne by both parties in such proportion as the whole sum insured bears to the whole value of the property insured.

6th. In case of loss the assured shall use their best endeavours in saving and protecting the property from damage at or after the fire. If they shall fail so to do, the company will not be liable for damage caused by such failure, and there can be no abandonment to the company of the property insured. The insured shall forthwith give a notice of loss to the company, and, as soon thereafter as possible, render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portion of the policies thereon; the actual cash value of the property; their interest therein; for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, were used; when and how the fire originated; and shall also produce a certificate, under the hand and seal of a magistrate, notary public, or commissioner of deeds, (nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the assured,) stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and
17 verily believes that the assured has without fraud sustained loss on the property insured to the amount which such magistrate, notary public, or *or* commissioner of deeds shall certify; and the assured shall, if required, submit to an examination under oath by any person appointed by the company, and, if deemed necessary by the company, to a second examination, and subscribe to such examinations when reduced to writing, and shall also produce their books of accounts and other vouchers, and all the property hereby insured, whether damaged or not damaged, and shall also produce certified copies of all bills and invoices where the originals have been lost, and exhibit the same for examination to any person named by the company. Damage to property not totally destroyed (unless the amount of said damage is agreed upon between the insured and the company) shall be appraised by disinterested men, mutually chosen by the assured and the company; and the company reserves the right to take the articles damaged at their appraised value. When personal property is destroyed, the assured shall forthwith cause it to be put in the best order possible, properly arranged, and make an inventory thereof, naming the quantity and cost of each article, and upon each article the damage shall be separately appraised, and the detailed report of the appraisers, in writing, shall form a part of the proofs hereby required, one-half of the appraisers' fees to be paid by the company. In case the loss of property held in trust or on commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set
18 forth, with their respective interest therein certified to by them.

If this policy is made payable, in case of loss, to a third party, or held as collateral security, the proofs of loss shall be made by the party insured; and until such proofs, declarations, and certificates are produced, and examinations and appraisals permitted, the loss shall not be payable. All fraud, or attempt at fraud, or false swearing, on the part of the assured, shall cause a forfeiture of all claims under this policy.

7th. In case any differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall *be*, at the written request of either party, be submitted to arbitrators mutually chosen, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy; and provided further, it shall be optional with the company to repair, rebuild, or replace the property lost or damaged with other of like kind and quality, within a reasonable time, giving notice of their intention so to do within thirty days after the receipts of proofs herein required; and in case this company elects to rebuild, the assured shall, if required, furnish plan and specifications of the buildings destroyed.

8th. It is furthermore expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim, by virtue of this policy, shall be sustainable in any court of law or chancery unless such suit or action be commenced within twelve months next after the loss shall occur; and should any such suit or action
19 be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding.

This policy shall not be valid until countersigned by the duly authorized agent at Meridian, Mississippi.

In testimony whereof the said Phœnix Insurance Company have caused these presents to be signed by their president and attested by their secretary, in the city of Hartford, State of Connecticut.

H. KELLOGG, *President.*

W. B. CLARK, *Secretary.*

Countersigned at Meridian this 24th day of December, A. D. 1867.

E. V. EARLY, *Agent.*

Be it remembered that, on the 12th day of August, 1869, being a day of the term of said circuit court of Lauderdale County, Mississippi, mentioned in the caption, an order was made in the cause mentioned in the process of summons and declaration, and entered on the minutes of the proceedings of the court in the words and figures following:

W. A. SLAUGHTER & CO.
vs.
THE PHŒNIX INSURANCE COMPANY.

In this cause the defendant, The Phœnix Insurance Company, by James S. Hamm, attorney for said defendant, comes and enters appearance in said action, and at the same time said defendant files a petition for a removal of said cause from this court to the next
20 circuit court of the United States for the district of Mississippi, to be held at Jackson, in said State, for trial in said last-named court, according to the act of Congress in such case made and provided; and said petitioner having tendered a bond, properly conditioned, with A. C. Edwards and L. Lowenstein as sureties thereto, it is ordered by the court that said bond be accepted, and that said cause be removed from this court to the next term of the circuit court of the United States for the district of Mississippi, to be held at Jackson, in said State.

THE STATE OF MISSISSIPPI, *Lauderdale County:*

I, B. F. Moore, clerk of the circuit court of the county of Lauderdale, in the State of Mississippi, do hereby certify that the foregoing 29 pages contain true and correct copies of the process of summons and return thereon, and of the declaration and papers filed therewith, and of the orders made by said court in the case therein mentioned, as the same remains on file and of record in the office and on the minutes of said court.

Given under my hand, and seal of office of said court annexed, at Marion, in the county above named, this the 28th day of September, A. D. 1869.

[L. S.] B. F. MOORE,
Clerk of the Circuit Court of the County of Lauderdale in the State of Mississippi.

THE STATE OF MISSISSIPPI, *Lauderdale County:*

I, Robert Leachman, judge of the circuit court of the eighth judicial district of the State of Mississippi, which district embraces the
21 county of Lauderdale, in said State, do hereby certify that B. F. Moore, whose genuine signature appears to the foregoing transcript, is, and was at the time he made his attestation thereto, clerk of said circuit court of Lauderdale, and that the attestation of said B. F. Moore to said transcript as clerk is in due form of law.

Given under my hand and seal this the 28th day of September, A. D. 1869.

[SEAL.] ROBERT LEACHMAN,
Judge of the Circuit Court of the 8th Jud'l Dist. Missi.

We acknowledge ourselves bound as securities for the costs of this suit.

BARROWS & SMYTHE,
Att'ys at Law.

And afterwards, to wit, at the November term, A. D. 1869, on the 8th day of November, A. D. 1869, being a day in said term of our said circuit court of the United States for the said southern district of Mississippi, the following proceedings were had in said cause, to wit:

W. A. SLAUGHTER & CO.
vs. } 847.
THE PHŒNIX INSURANCE COMPANY.

The defendants suggest a diminution of the record of this case, in this, that the petition and bond filed by defendants below are not included in the record. Defendants here present a certified copy of said petition and bond, and move the court here for leave to amend said record by filing said petition and bond, and making the same a part of said record; which motion is granted, and said record ordered
22 to be amended by filing said petition and record.

Whereupon, on the said 8th day of November, 1869, being a day in the said November term of said court, the said petition and bond were filed by the defendants in words and figures following, to wit:

Be it remembered that, on the 12th day of August, A. D. 1869, being

a day of the term of said circuit court of Lauderdale County, Mississippi, mentioned in the caption, the following petition was filed:

To the Hon. Robert Leachman, judge of the 8th judicial district of the State of Mississippi, embracing the county of Lauderdale, in said State:

The petition of The Phœnix Insurance Company respectfully shews that a suit has been brought in the circuit court of said county by W. A. Slaughter & Co. against your petitioner, and that the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs; the said plaintiffs are citizens of the State of Mississippi, and that your petitioner is a citizen of the State of Connecticut, being a fire insurance corporation, located and having its principal office and doing business at the city of Hartford, in the said State of Connecticut, and all the individuals composing said company being citizens of the last-named State; that your petitioner, said fire insurance company, desires the removal of said cause for trial from said circuit court of Lauderdale County, Mississippi, into the next circuit court of the United States for the southern district of Mississippi, to be held at Jackson in said last-named State, in the district where the suit is now pending. And
23 to the end that the removal of said suit may be ordered as prayed, petitioner offers and tenders good and sufficient surety for entering in said circuit court of the United States, on the next session thereof, copies of the process against defendant, and also for defendant there appearing.

Phœnix Insurance Company of Hartford,

By E. V. EARLY.

Resident Agent at Meridian Mississippi.

THE STATE OF MISSISSIPPI, *Lauderdale County:*

E. V. Early, being duly sworn, says he resides in the city of Meridian, in the State of Mississippi, and is the agent of The Phœnix Insurance Company, the petitioner in the foregoing petition; that said petitioner is a fire insurance corporation, located under and by the laws of the State of Connecticut, located, doing business, and having its principal office at Hartford, in the State of Connecticut; that he has heard read the foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge.

E. V. EARLY, *Agent.*

AUGUST 12TH, A. D. 1869.

THE STATE OF MISSISSIPPI, *Lauderdale County:*

Personally appeared before me, B. F. Moore, clerk of the circuit court of Lauderdale County, in the State above named, E. V. Early, to me known as the agent of The Phœnix Insurance Company, and made oath to the above certificate by him subscribed.

In witness whereof I have hereunto set my hand and affixed my official seal, at Marion, in the day and year above written.

B. F. MOORE,

24 *Clerk of the Circuit Court Lauderdale County, in the State of Mississippi.*

Be it remembered that, on the 12th day of August, A. D. 1869, being a day of the term of said circuit court of Lauderdale County, Mississippi, mentioned in the caption, the following bond was filed:

THE STATE OF MISSISSIPPI, *Lauderdale County:*

Know all men by these presents that we, The Phœnix Insurance Company, principal, and A. C. Edwards and L. Lowenstein, sureties, are held and bound unto W. A. Slaughter & Co. in the sum of one thousand dollars, for the payment of which we bind ourselves, our heirs, executors and administrators.

Given under our hands and seals this 12th day of August, 1869.

The above obligation is conditional as follows:

Said W'm A. Slaughter & Co. have brought a suit in the circuit court of Lauderdale County, Mississippi, against The Phœnix Insurance Company, and said Phœnix Insurance Company has petitioned to have said suit removed *to* from said circuit court of Lauderdale County into the next circuit court of the United States for the southern district of Mississippi, to be held at Jackson, in said State, in the district where the suit is now pending; and said circuit court of Lauderdale County has made an order that said cause be moved for trial from said circuit court of Lauderdale County into the next circuit court of the United States, to be held as above stated:

Now, if said defendant, The Phœnix Insurance Company, shall enter in said circuit court of the United States, on the first day of the
25 next session thereof, copies of the process against said defendant, and shall appear in said circuit court of the United States and enter an appearance in said action, then the foregoing obligation is to be void; otherwise to remain in full force and effect.

Phœnix Insurance Company of Hartford,
By E. V. EARLY, *Agent.* [SEAL.]
L. LOWENSTEIN. [SEAL.]
A. C. EDWARDS. [SEAL.]

Signed in open court in my presence this the 12th day of August, 1869.

B. F. MOORE, *Circuit Clerk.*

THE STATE OF MISSISSIPPI, *Lauderdale County:*

I, B. F. Moore, clerk of the circuit court of Lauderdale County, in the State of Mississippi, do hereby certify that the foregoing five (5) pages contain true and correct copies of the petition and bond in the case mentioned therein, as the same remains on file and of record in the office and on the minutes of said court.

Given under my hand and seal of office of said county, affixed at Marion, in the county above named, this the 2nd day of November, A. D. 1869.

[L. S.] B. F. MOORE,
Clerk of the Circuit Court of Lauderdale County, in the State of Mississippi.

And on the 29th day of October, A. D. 1869, came The Phœnix Insurance Company by Messrs. Barrows and Smythe, and John D. Freeman, its attorneys, and filed in the clerk's office of said court their pleas as follows, to wit:

26 In circuit court of the United States, 5th circuit and southern district of Missi., to November term, A. D. 1869.

W. A. SLAUGHTER & Co.
vs. } 847.
THE PHŒNIX INSURANCE CO. OF HARTFORD, CONN.

And now at this term of the court came the said defendants by their

attornies, and defend the wrong and injury when, &c., and say actio non, because they say that they did not undertake or promise in manner and form as the said plaintiffs have above thereof complained against them; and of this they put themselves on the contry.

2nd. And for a further plea to the first count in said declaration said defendants say actio non, because they say that said plaintiffs, at the time of obtaining from defendants said policy of insurance in said first count described, and contrary to the provisions of the said policy, without the knowledge or consent of said defendants endorsed or written on said policy of insurance, obtained of and made with The Enterprise Insurance Company of Cincinnati, on or about the 24th day of December, A. D. 1867, another insurance of the same goods so insured by defendants for the sum of twenty-five hundred dollars; and this they are ready to verify. Wherefore they pray judgment, &c.

3rd. And for further plea to said first count said defendants say actio non, because they say that said plaintiffs, contrary to the terms and provisions of said policy of insurance sued upon, without the written permission, or permission endorsed on said policy of insurance, by said plaintiffs, did keep gunpowder on the premises, and in the said
27 storehouse described in said policy of insurance, where said goods so insured were kept; and this they are ready to verify. Wherefore they pray judgment, &c.

4th. And for further plea in this behalf to said first count said defendants say actio non, because they say that said plaintiffs, in their application to defendants for the said insurance of said goods, falsely and fraudulently represented that said goods were well worth the sum of eight thousand dollars, when, in truth and in fact, said goods so kept in said store house so insured were at no time during said insurance worth the said sum of eight thousand dollars; and this they are ready to verify. Wherefore, &c.

5th. And for a further plea in this behalf to said first count said defendants say actio non, because they say that the alleged loss of said goods by fire was occasioned by the fraudulent acts of the plaintiffs themselves; and this they are ready to verify. Wherefore they pray judgment, &c.

6th. And for further plea to said count in said declaration defendants say actio non, because they say that, after said policy of insurance sued upon was obtained by plaintiffs, and before said fire occurred, two brick buildings were in process of construction near to, and on the south side of, the said storehouse insured by plaintiff, whereby a change occurred in the exposure of said storehouse to the dangers of fire, whereby the dangers of fire and the risk of defendants was increased, of which said plaintiffs gave no notice to said defendants; and this they are
28 ready to verify. Wherefore, &c.

7th. And for further plea to said first count said defendants say actio non, because they say that said plaintiffs, at the same time when they obtained of defendants said policy of insurance (sued upon) for said sum of twenty-five hundred dollars, also obtained of the "Enterprise Insurance Company of Cincinnati," a corporation incorporated by the State of Ohio, and doing business at Meridian, Missi., a policy of insurance for the like sum of twenty-five hundred dollars on the same identical goods, wares, and merchandise insured by said defendants; and said defendants aver that, by the terms of said policy of insurance sued upon, the said plaintiffs are entitled to recover of defendants no greater portion of the loss sustained than the sum insured for by defendants bears to the whole amount of insurance *and* said goods, to wit, the sum of four

thousand dollars; and so said defendants say that they are in no event liable to plaintiffs for a greater sum that one-half of the alleged loss sustained by plaintiffs; and this they are ready to verify. Wherefore they pray judgment, &c.

BARROWS & SMYTHE, &
J. D. FREEMAN, *for Def'ts.*

And afterwards, to wit, at the November term of our said court, A D. 1869, and on the 16th day of November, 1869, being a day of said term, came the plaintiffs by attorney, and filed their certain replication in words and figures following, to wit:

29 In the circuit court of the United States for said district, Nov'r term, 1869.

W. A. SLAUGHTER & Co.
vs. } 847.
THE PHŒNIX INSURANCE CO., HARTFORD, CONN.

1st. And the said plaintiffs, by their attorney, come and say, as to the plea of the defendants first above pleaded, that they do the like.

2. And as to the seventh plea of said defendants, which is to the 1st count in the plaintiffs' declaration, say that it is true that *true it is* they obtained a policy of insurance on the same goods of The Enterprise Insurance Company of Cincinnati, but they say that said policy was obtained simultaneously with that obtained from the defendants, and with their knowledge and consent, and by and through their own agent, who was as well the agent of the said Enterprise Insurance Company; and that said policy from the said Enterprise Insurance Company was obtained by said agent, he advising the acceptance, and actually granting the same; and this the said plaintiffs are ready to verify.

3d. And as to the plea of the said defendants thirdly above pleaded, the said plaintiffs say the same is not sufficient in law, and for cause of demurrer say, 1st, that said plea does not aver that the said plaintiffs kept gunpowder on the premises and in said store at any one time in greater quantities than one barrel; 2nd, said plea does not state the quantity kept by any designation which would indicate a violation of the terms of the policy; and for other causes appearing on the
30 face of said plea. Wherefore they pray judgment, &c., &c.

4th. And as to the plea of the said defendants fourthly above pleaded, they say that they did not falsely or fraudulently represent the value of their goods as in said plea is alleged; and this they pray may be inquired of the country.

5th. And as to the said plea of the said defendants fifthly above pleaded, they say that the loss of the goods mentioned in the plaintiffs' declaration was not occasioned by the fraudulent acts of the plaintiffs; and this they pray may be inquired of by the country.

6th. And as to the said plea of the said defendants sixthly above pleaded, the plaintiffs say that the same is not sufficient in law, and for cause of demurrer, say, 1st, said plea does not set forth in what manner the erection of brick buildings on the south side of the storehouse of said store increased the risk; 2d, said plea does not state or show that said buildings were erected by the plaintiffs, or that they could in any way hinder the same; 3rd, said plea does not shew that the erection of said buildings infringed the policy; and for other causes appearing on the face of . Wherefore they judgment, &c.

And as to the said plea of the said defendants secondly above pleaded, they say that the same is not sufficient in law, and for causes of demurrer, say, 1st, that said plea purports to answer the whole cause of action, when in fact the allegations thereof amount to a defence of only part of said cause of action; 2d, said plea does not aver that *that*
31 said policy of the said Enterprise Insurance Company was obtained before or after the policy obtained from the said defendants; and for other reasons apparent on the face of said plea. Wherefore they pray judgment, &c.

HARRIS & WITHERS,
Pl'ff's' Att'ys.

And on the 19th day of November, 1869, being a day in the November term of said court, A. D. 1869, defendants, by their attornies aforesaid, filed their demurrer to the plaintiffs' replication to defendants' 7th plea, heretofore filed, and joinder in plaintiffs' demurrer to 2nd, 3rd, & 6th pleas of defendants, in words and figures following, to wit:

W. A. SLAUGHTER & Co.
vs. } 847.
THE PHŒNIX INSURANCE CO.

And said defendants, as to the replication of plaintiffs to the seventh plea of defendants, say the same is insufficient in law, &c., and therefore defendants demur to the same, and for the cause of demurrer, shew: 1st. Said replication admits the truth of said defendants' said plea, and sets up no sufficient grounds of avoidance. 2d. The fact that the same person was the agent of both insurance companies, and that he both policies of insurance, does not *charge* or avoid the contract sued upon, nor in any wise *effect* the liability of either party to the same.

And as to the demurrer of plaintiffs to the third, sixth, and seventh pleas of defendants, defendants insist that said pleas are a sufficient answer to said first count in said declaration; and therefore they pray judgment, &c.

32 BARROWS & SMYTHE.
J. D. FREEMAN.

And on the same day in said term, on the said 19th day of November, 1869, came the plaintiffs by their attorney, and filed in said court their replication, by leave of our court first had, to the second plea of said defendants, which is in the words and figures following, to wit:

W. A. SLAUGHTER & Co.
vs. } 847.
THE PHŒNIX INSURANCE CO.

And the said plaintiffs, by leave of the court first had and obtained, for replication to the plea of the defendant secondly above pleaded says that true it is they obtained a policy of insurance on the same goods from The Enterprise Insurance Company of Cincinnati, but they say that the said policy was obtained simultaneously with that obtained from the defendants, and with their knowledge and consent, and by and through their own agent; that the application of the plaintiffs was made to the defendants through their agent established in this State, under the laws thereof, for the sum of $5,000 *dollars;* that said agent

being then and there in like manner the established agent of The Enterprise Company, recommended and advised that the said sum be divided, and that a policy for $2,500 be taken from each of said parties, and then and there granted the same as said agent; and this they
33 are ready to verify.

HARRIS AND WITHERS,
For Pl'ffs.

And thereupon on the same day and year aforesaid came the defendants by their said attorney, and filed their demurrer to said replication of said plaintiffs in words and figures following, to wit:

W. A. SLAUGHTER & Co.
vs.
THE PHŒNIX INSURANCE COMPANY OF HARTFORD.

And now, at this term of the court, the plaintiffs' demurrer to defendants' second plea having been overruled by the court, with leave to plead over, and said plaintiffs having filed their replication to said second plea of defendants, said defendants say said replication is insufficient in law to require any other answer than by demurrer, and defendants do demur thereto, and for cause of demurer assign the following:

1st. Said replication admits the truth of the plea, and that the same is well pleaded, and sets up no sufficient matter in avoidance of said plea.

2d. A verbal notice to the agent of defendants of the obtaining of another insurance on the same goods by plaintiffs is not sufficient notice to defendants to avoid said plea.

3d. The alleged proposition of plaintiffs to the agent of defendants to insure said goods *said goods* for $5,000, and that said agent refused to insure said goods as agent for defendants for a greater sum
34 than $2,500, but as agent for The Enterprise Insurance Company insured said goods for $2,500 more, but without the written consent of defendants endorsed on said policy sued upon, is not a waiver by defendants of the terms of said policy, requiring said plaintiffs to have the written consent of defendants endorsed on said policy sued upon.

4th. Said replication is double, setting forth two distinct defences.

JOHN D. FREEMAN,
Att'y of Def'ts.

And on the same day, in the November term, A. D. 1869, aforesaid, the defendants filed their 8th plea in this behalf as follows, to wit:

W. A. SLAUGHTER & Co.
vs.
THE PHŒNIX INSURANCE Co.

8th. And for further plea in this behalf said defendants say actio non, because they say that said plaintiffs, at the time they applied for said policy of insurance, falsely and fraudulently represented to said defendants that they kept no gunpowder, nor would keep any gunpowder in said storehouse where said goods insured by plaintiffs were kept; whereas, in truth and in fact, said plaintiffs, after obtaining said policy, did keep gunpowder in said store with said goods, thereby greatly increasing the risque of defendants, and well knowing that defendants

would not have insured said goods had they known or been informed by plaintiffs that they did or would keep said gunpowder in said storehouse; and this they are ready to verify.

35 J. D. FREEMAN.

And on the same day and year aforesaid came the plaintiffs by attorney, and filed their replication to the 8th plea of defendants in the words and figures following, to wit:

W. A. SLAUGHTER & Co.
vs.
THE PHŒNIX INSURANCE Co. } Nov. term, 1869.

And the said plaintiffs, as to the said plea of the said defendants eighthly above pleaded, says that they did not falsely or fraudulently represent to the defendants that they kept no gunpowder, nor would keep any gunpowder in their said store, as the defendants in their said plea allege, and aver that they made no representations nor stipulations in regard to gunpowder, except those contained in the policy, which is set forth in their declaration; and this they pray may be enquired of by the country.

HARRIS & WITHERS, *P. Q.*

And on the said 19th day of November, 1869, in the term aforesaid, the said defendants, by their said attorney, filed their 9th plea herein; which is in the following words and figures, to wit:

W. A. SLAUGHTER & Co.
vs.
PHŒNIX INSURANCE Co.

9th. And for a further plea in this behalf said defendants say actio non because they say that said *defendants*, after obtaining from defendants said policy of insurance in said first count described, and

36 contrary to the provisions of said policy, without the consent of said defendants endorsed or written on said policy of insurance, obtained and made with The Enterprise Insurance Company of Cincinnati another policy of insurance of the same goods so insured by defendants for the additional sum of twenty-five hundred dollars; and this they are ready to verify.

JOHN D. FREEMAN,
For Def'ts.

And afterwards, to wit, on the said 19th day of November, 1869, being the same day in the November term, 1869, of the said circuit court, the following proceedings and order were had and entered on the minutes of said court, to wit:

W. A. SLAUGHTER & Co.
vs.
THE PHŒNIX INSURANCE Co. of Hartford, Conn. } 847.

This cause coming up for hearing on the demurrers of plaintiffs to the second, third, and sixth pleas of defendants to plaintiffs' declaration, and also upon the demurrer of defendants to the replication of plaintiffs

to the seventh plea of defendants, upon argument of the same it is now ordered that plaintiffs' demurrer to the second plea of defendants be overruled, and that plaintiffs have leave to plead over; that plaintiffs' demurrer to the third and sixth pleas of defendants be and the same is hereby sustained, and that defendants have leave to plead over if they see fit; and that defendants' demurrer to the replication of plaintiffs to the seventh plea of defendants be and the same is hereby sustained.

37 And thereupon said plaintiffs filed their replication to the second plea of defendants, to which defendants demurred, and said demurrer was overruled, and leave is granted to plaintiffs to take issue on said 2d plea.

And afterwards, at a regular term of said circuit court, held according to law on the 1st Monday of May, A. D. 1870, and on the 10th day of May, 1870, being a day in the term aforesaid, came the plaintiffs by attorney, and filed their replication to the 7th plea of defendants, pursuant to leave granted for that purpose; which replication is in words and figures following, to wit:

W. A. SLAUGHTER & Co.
vs.
PHŒNIX INSURANCE COMPANY.

And the plaintiffs, by leave of court, for replication to the 7th plea of the defendants, say that the said two policies granted by the two companies aforesaid were so granted by them at the same time through their agent, established by each of them under the laws of this State in that behalf; that the said companies, each through their said agent, agreed with the plaintiffs to grant to insure his said goods and merchandise for five thousand dollars, to be divided equally between them, each granting a policy for $2,500, and therefore they say that the defendants are liable to them, as they have claimed in their said declaration, and as the law accords on the said policy; and this they pray may be enquired of by the country.

HARRIS & WITHERS, *P. Q.*

38 And on the same day and year aforesaid, in the term last aforesaid, the plaintiffs by attorney filed their replication to the 9th plea of defendants herein in figures and words as follows, to wit:

W. A. SLAUGHTER & Co.
vs.
PHŒNIX INSURANCE COMPANY.

And to the 9th plea by the defendants pleaded the plaintiffs say precludi non, because they say that it is true that they obtained a policy of insurance from the said Enterprise Insurance Company on the same goods; but they say that said policy was obtained simultaneously with that obtained from the defendants, and with their knowledge and consent, through their said agent established in this State under the laws thereof, for a policy for $5,000; that said agent, being then and there in like manner the agent of the said Enterprise Company, recommended and advised that the said sum be divided, and that a policy for $2,500 be taken from each of said companies, and then and there granted the same as said agent, and the plaintiffs therefore deny that

the policy taken from said Enterprise Company was taken after the obtaining of the policy from the said defendants; and of this they put themselves upon the country.

HARRIS & WITHERS, *P. Q.*

And afterwards, on the 20th day of May, 1870, being a day in the term of said circuit court last aforesaid, came the defendants by
39 their attorney, and filed their rejoinder to plaintiffs' replication to the 2d plea of defendants herein as follows, to wit:

W. A. SLAUGHTER & Co.
vs.
PHŒNIX INSURANCE Co.

And the said defendants, by leave of the court, for rejoinder to the replication of plaintiffs to the plea of defendants secondly above pleaded, say that the said policy was not obtained simultaneously with that obtained from defendants, and with their knowledge and consent, and by and through their own agent, as alleged; further say that the application of the plaintiffs was not made to the defendants, through their agent established in this State, under the laws thereof, for the sum of $5,000 as alleged, or that said agent then and there in like manner as the established agent of the said Enterprise Company recommended and advised that the said sum be divided, and that a policy for $2,500 be taken from each of said companies, as alleged, or that he then and there granted the same as said agent, as alleged in said replication of plaintiff; and of this they put themselves upon the country.

FREEMAN & SMYTHE,
Att'ys for Def'ts.

And afterwards, to wit, on the said 20th day of May, A. D. 1870, the same being a day in the May term, A. D. 1870, of our said circuit, the following proceedings and judgment were had and rendered in said cause, to wit:

W. A. SLAUGHTER & Co.
vs. 847.
PHŒNIX INSURANCE COMPANY.

This day came the parties by attorney; and, issue being joined,
40 thereupon came a jury as follows, to wit: P. Rivinac, A. K. Martin, J. P. Sessions, E. T. Evans, Jeff. Sessions, R. B. Harper, T. J. Payne, C. A. Lusk, D. S. Downing, J. A. Voigt, Ed. Baily, and J. Moody, who, being elected, empannelled, and sworn, and the issues being submitted to them, upon their oaths say:

"We find for the plaintiffs, and assess their damages at two thousand four hundred and seventy-two and $\frac{50}{100}$ dollars."

Whereupon it is considered by the court that the plaintiffs have and recover of the defendant the damages aforesaid as assessed, with interest thereon at the rate of six per cent. per annum from this date until paid, together with the costs in this behalf expended, to be taxed, &c., for which execution may issue.

And afterwards, on the 23d of May, A. D. 1870, being a day in the term last aforesaid, the defendants by their attorney filed their motion

in the words and figures following, which was then and there duly entered on the motion docket of our said court, viz:

SLAUGHTER & CO.
vs.
THE PHŒNIX INS. CO. } May term, 1870.

The said defendants, by attorney, moves the court to set aside the verdict in this case and grant a new trial on the following grounds:

1st. That the court erred in giving the following instruction to the jury, viz: "That the safe and furniture are merchandise, if kept for sale and considered part of the stock; that the use of them in
41 connection with the business would not *effect* the character of the articles as merchandise; whether kept for immediate sale or not, would not *effect* the question."

2d. The jury found contrary to the evidence.

3d. The jury found contrary to the instructions of the court.

FREEMAN & SMYTHE, *for motion.*

HARRIS & WITHERS, *contra.*

And afterwards, to wit, on the 25th day of May, A. D. 1870, being a day in the term last aforesaid, the following order was made and entered in said cause, to wit:

W. A. SLAUGHTER & CO.
vs.
PHŒNIX INSURANCE COMPANY. }

This day came on the motion of said defendant to set aside the verdict of the jury and for a new trial herein, and the same being fully considered by the court, it is ordered that said motion be, and the same is hereby, overruled.

Writ of error bond.

Know all men by these presents that we, The Phœnix Insurance Company of the City of Hartford, in the State of Connecticut, David N. Barrows and George A. Smythe, both of the county of Hinds, and State of Mississippi, are held and firmly bound unto W. A. Slaughter and Jacob Stewart, late partners in trade under the firm name of W. A. Slaughter & Co., of Meridian, Lauderdale County, Mississippi, in the full and just sum of five thousand dollars, to be paid to the
42 said W. A. Slaughter and Jacob Stewart, late partners aforesaid, their executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 26th day of May, A. D. 1870.

Whereas lately, at a circuit court of the United States for the southern district of Mississippi, in a suit depending in said court between the said W. A. Slaughter and Jacob Stewart, late partners, &c., plaintiffs, and the said Phœnix Insurance Company, defendant, judgment was rendered in favour of said plaintiffs against the said defendant on the 20th day of May, A. D. 1870, for $2,472 50 damages, and costs of suit; and the said defendant, The Phœnix Insurance Company, having obtained a writ of error to the Supreme Court of the United States, and filed a copy thereof in the clerk's office of said circuit court, to

reverse the judgment in the aforesaid suit, and a citation directed to the said W. A. Slaughter and Jacob Stewart, late partners aforesaid, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Phœnix Insurance Company shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea
43 good, then the above obligation to be void; otherwise to remain in full force and virtue.

PHŒNIX INSURANCE COMPANY,
By D. N. BARROWS, [SEAL.]
Their Attorney in fact.
D. N. BARROWS. [SEAL.]
GEO. A. SMYTHE. [SEAL.]

UNITED STATES OF AMERICA,
Southern District of Mississippi:

Personally appeared before the undersigned George A. Smythe, who, being duly sworn, saith that, after the payment of all his just debts and liabilities, and over and above the exemptions allowed by law, he is worth the sum of five thousand dollars in visible property, and that he is well acquainted with the property and pecuniary condition of David N. Barrows, and verily believes that said Barrows is worth the sum of five thousand dollars in visible property over and above all his just debts and liabilities and the exemptions allowed by law.

GEO. A. SMYTHE.

Sworn to and subscribed before me this 26th May, 1870.

GEO. T. SWANN, *Clk.*

The foregoing bond and sureties approved by me this 27th May, 1870.

R. A. HILL, *Judge.*

44 UNITED STATES OF AMERICA,
Southern District of Mississippi, ss:

I, George T. Swann, clerk of the circuit court of the United States for the southern district of Mississippi, hereby certify that the foregoing and annexed forty-three (43) pages contain a true and complete transcript of the record, process, proceedings, and final judgment in a certain cause lately pending in said court, No. 847, wherein W. A. Slaughter & Co. were plaintiffs, and The Phœnix Insurance Company of Hartford, Connecticut, defendants, as the same remain of record in our said court, together with a true copy of the writ of error bond filed and approved therein, as the same remains on file in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at Jackson, in said district, this 23rd day of July, A. D. 1870, and in the 95th year of the independence of the United States of America.

[SEAL.] GEO. T. SWANN, *Clerk.*

45 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of Mississippi, greeting:

Because, in the records and proceedings, and also in the rendition of

the judgment of a plea which is in the said circuit court between W. A. Slaughter and Jacob Stewart, late partners in trade under the firm name of W. A. Slaughter & Co., of Meridian, Lauderdale County, Mississippi, plaintiffs, and The Phœnix Insurance Company of the City of Hartford, in the State of Connecticut, defendant, a manifest error hath happened to the great damage of the said Phœnix Insurance Company, defendant, as by their complaint appears:

We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further
46 to be done therein, to correct that error, what of right and according to the laws and customs of the United States ought to be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the 25th day of May, in the year of our Lord one thousand eight hundred and seventy, and in the 94th year of the independence of the United States of America.

[SEAL.]

GEO. T. SWANN,
Clerk of the Circuit Court of the United States
for the Southern District of Mississippi.

Clerk's fee for transcript, paid by G. A. Smythe, esq., att'y of defendants, $13 90.

GEO. T. SWANN, *Clk.*

(Indorsed:) 847. Phœnix Insurance Company vs. W. A. Slaughter & Co. Writ of error. Filed May 28th, 1870. Geo. T. Swann, Cl'k.

46½

U. S. MARSHAL'S OFFICE,
Jackson, Miss., May 28th, 1870.

UNITED STATES OF AMERICA,
Southern District of Mississippi:

I hereby nominate and appoint B. G. Bankston my special deputy to execute and return the within process according to law.

Witness my hand and seal this 28th day of May, 1870.

[SEAL.]

E. A. PEYTON,
U. S. Marshal Southern District of Mississippi.

47 UNITED STATES OF AMERICA, *ss:*

To W. A. Slaughter & Jacob Stewart, late partners in trade under the firm name of W. A. Slaughter & Co., greeting:

You are hereby cited & admonished to be & appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Mississippi, wherein The Phœnix Insurance Company of the City of Hartford, in the State of Connecticut, is plaintiff, & you are defendants in error, to show cause, if any there be, why the judgment in the said

writ of error mentioned should not be corrected, & speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert A. Hill, a judge of the said circuit court of the United States for the southern district of Mississippi, this day of May, in the year of our Lord one thousand eight hundred & seventy.

This May 27th, 1870.

[SEAL.]

R. A. HILL,
A Judge of the Circuit Court of the United States for the Southern District of Mississippi.

48 Received and executed by handing a true copy of the within citation to Wiley P. Harris, atto. for def't in error, this 28 May, 1870, said Wiley P. Harris being of the firm of Harris & Withers, attorneys for defendants in error.

E. A. PEYTON,
U. S. Marshal So. Dist. Mississippi,
By B. G. BANKSTON, *D. M.*

Ex.	2 00
Ex. & R.	50
	2 50

UNITED STATES OF AMERICA,
Southern District of Mississippi:

Personally appeared before the undersigned, James D. Stewart, United States commissioner, &c., B. G. Bankston, who, being duly sworn, stated upon oath that on the 28th day of May, A. D. 1870, he, being a lawful deputy of E. A. Peyton, United States marshal for said district, executed the within citation by delivering a true copy of the same to Wiley P. Harris, of the firm of Harris & Withers, attorneys for defendants in error.

B. G. BANKSTON.

Sworn and subscribed before me this 29th day of May, A. D. 1870.

JAMES D. STEWART,
U. S. Comm'r, &c.

(Indorsed:) 847. In the U. S. circuit court. W. A. Slaughter & Co. v. Phœnix Insurance Company of Hartford, Conn. Citation. 219.

(Indorsement on cover:) No. 500. The Phœnix Insurance Company, plaintiff in error, vs. W. A. Slaughter and Jacob Stewart, late partners as W. A. Slaughter & Co. S. Mississippi C. C. U. S.

Filed 25th October, 1870.

IN THE SUPREME COURT

OF THE

UNITED STATES.

THE PHŒNIX INSURANCE COMPANY,

Plaintiffs in Error.

No. 268.] *vs.*

W. A. SLAUGHTER & CO.,

Defendants in Error.

BRIEF

OF

HARRIS & WITHERS.

For Defendants in Error.

JACKSON, MISS.:
CLARION JOB PRINTING OFFICE AND BOOK-BINDERY.
1871.

IN THE SUPREME COURT

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THE PHŒNIX INSURANCE COMPANY,

Plaintiffs in Error,

No. 268.] *vs.*

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BRIEF

OF

HARRIS & WITHERS.

For Defendants in Error.

JACKSON, MISS.:
CLARION JOB OFFICE AND BOOK-BINDERY.
1871.

In the Supreme Court of the United States.

December Term, A. D., 1870.

THE PHŒNIX INSURANCE COMPANY,

No. 268.] *vs.*

W. A. SLAUGHTER & CO.

This was an action brought on a Policy of Insurance by Defendants in Error, against Plaintiffs in Error, in the Circuit Court of Lauderdale county, Mississippi, which, on the application of Plaintiffs in Error, was under the act of Congress, removed to the Circuit Court of the United States, for the Southern District of Mississippi. Numerous pleas were filed, and issue was joined on all but the 2d, 3d, and 6th pleas, which were demurred to. The demurrer was sustained to the 3d and 6th pleas, and overruled as to the 2d. Defendants below, demurred to Plaintiffs replication to 7th plea, and the demurrer was sustained. Leave was given both parties to plead over, which was done, and issues were joined and submitted to a jury at the May Term, 1870, and verdict for Defendats in Error for the sum of two thousand four hundred and seventy-two dollars and fifty cents, for which judgment was entered against the Insurance Company. There was a motion for a new trial, which was overruled, and the case is brought to this Court by writ of error. It will be noted that no exceptions were taken to the ruling of the Court below, and no bill of exceptions was tendered or signed at any stage of the proceedings. The only questions, therefore, that can be considered by this Court, arise on the pleadings. We insist that there is no error apparent on the face of the record.

No assignment of errors has been filed but we are advised that the only error complained of by Plaintiffs in Error, is the action of the Court below, in sustaining the demurrer to their third plea. We insist that it is now too late to raise this point.

In sustaining the demurrer, leave was given them to plead over. Had judment been rendered against Plaintiffs in Error on the demurrer, there is no doubt but that it could have been examined by this Court on writ of error. Rogers vs. Burlington, 3 Wallace 661.

No judgment was rendered against them, but the order of the Court on sustaining the demurrer was that "defendants have leave to plead over if they see fit." This they did, and filed their 8th plea, which put in issue before the jury, the keeping of gunpowder, contrary to the agreement between the parties. By pleading over without any exception to the action of the Court, they waived their right to have the question examined on writ of error.

Coit vs Waples & Zerkle, 1 Minnessota Reports, 140. Belcher vs. Sandusky City Bank, Ib. 311. Sullenberger vs. Gest, 14 Ohio Reports, 204. Peck vs. Cowing, 1 Denio, N. Y. Reports, 222; 2 Wendell, N. Y. Reports, 137; 6 Hill, N. Y. Reports, 621.

II

If, however, the Court should hold that the question can be examined on writ of error, we insist that the demurrer was properly sustained. The 3d plea is as follows (page 13 of record):

"And for further plea to said first count, said defendants say action "non, because they say that said Plaintiff, contrary to the terms and "provisions of said Policy of Insurance sued upon, without the written "permission, or permission endorsed on said Policy of Insurance by said "Plaintiffs, did keep gunpower on the premises, and in said storehouse, "described in said Policy of Insurance where said goods so insured "were kept; and this they are ready to verify, etc."

This plea is manifestly bad for several reasons. In the first place, it submitted to the jury the construction and legal effect of the policy. This was a question for the Court to decide, not for the jury. The construction of all instruments belongs to the Court alone. "What a contract means is a question of law." 2 Parsons on Contracts, 492 and note "b."

Had issue been taken on the 3d plea, the issue would have been, that the Plaintiffs kept gunpowder contrary to the terms and provisions of the Policy of Insurance sued on. This would have imposed on the jury the necessity of interpreting and construing the Policy of Insurance. The issue would have been an issue of law combined with an issue of fact. The Plaintiff below had the right to insist that the issue of law and of fact should be separated, the one to be decided by the Court, the other by the jury. The Court below certainly did right in not forcing Plaintiff below to take issue on a plea which presented a question of law. This view of the question is conclusive of the case. The plea was manifestly bad and the demurrer was properly sustained.

But the plea was bad on another ground. It fails to state the quantity of gunpowder kept by any designation which would indicate a violation of the terms of the policy.

We would call the attention of the Court to the fact that the clause of the policy on the subject of gunpowder and other articles, as set out in the declaration (page 3 of printed record), is improperly punctuated, so as to change its legal effect, and is materially different from the copy of the policy in the printed record (page 7). There is a semicolon used after the word "premises" in the policy as set forth in declaration, where a *comma* is used in the original policy. This was an error either of the Clerk in copying, or of the printer in setting the type. As this was an important matter, it was agreed in writing, by Counsel, that the original policy filed with the papers, and introduced on the trial below, should be forwarded with the the record and used for reference by the Court. We invite the particular attention of the Court to the original policy.

In the copy of the policy as it appears in the printed record (page 7), there are some words omitted, but the true sense of the particular clause under discussion is given, and as there printed, the language is too plain to admit of any construction, except that which we contend for.

In the 4th subdivision of the conditions embraced in the body of the policy, a number of causes are specified which shall vacate the policy. These causes are embraced in *separate clauses*, each class of which is separated from the others by a *semicolon*. The last of these clauses, in in the original policy, is as follows:

———"or if gunpowder, phosphorus, saltpetre, naptha, benzine, ben-"zine varnish, benzole, petroleum, or crude earth oils are kept on the "premises, or if camphene, burning fluid, refined coal or earth oils are "kept for sale, stored or used on the premises, in quantities exceeding "one barrel at any one time, without written permission in, or endorsed "upon this policy; then and in every such case, this policy shall be "void."

By reference to the policy, it will be found that a number of clauses, each separated from the other by a *semicolon*, are set out in the 4th subdivision. "Commas" and "or's" frequently occur in these several clauses, but all the articles and stipulations in each separate clause go together as a class. In the clause quoted, there is no semicolon after the word premises, but only a *comma*, and we insist that on a fair construction of the entire clause, the restriction on keeping gunpowder, saltpetre, etc., are precisely the same as to *quantity*, as to keeping cam-

phene, burning fluid, etc. This is certainly the correct grammatical construction of the sentence. The entire clause embraced between the semicolons is goverened by the language, "in quantities exceeding one barrel at any one time." This Court is called on to ignore the proper grammatical construction of this clause, and give it a construction that would enable the Company to avoid the payment of nine-tenths of the policies issued by them. There is scarcely a store or dwelling house in the entire country, that has not in it a greater or less quantity of gunpowder or saltpetre. Besides a rational construction of the clause in question, leads to precisely the same result as the proper grammatical construction. What reason is there, that the smallest quantity of saltpetre, which is by no means a dangerous substance, and is kept in nearly every farm house in the country, should be held to vacate a policy, while an entire barrel of camphene, or burning fluid, or coal oil, which are notoriously dangerous and inflamable, may be kept without objection. Public policy, as well as justice, demands that such a construction shall be given a policy of insurance, if its terms will possibly admit of it, as will give the assured, who acts in good faith, the benefit of the policy for which he has paid his money; and not permit an astute and unconscientious Company to so frame the conditions of their policies, that they shall be a mere snare to entrap the unwary.

The great mass of persons who insure, are merchants manufacturers, farmers and laborers, ignorant of the niceties of the law, who, relying on the good faith and fair dealing of the Insurance Company as to the conditions inserted in their policies, accept the policies without ever reading the conditions, which are usually printed with the smallest type. Legal advice is rarely, if ever taken by a party about to insure his residence or store. Such contracts are entitled to the most liberal construction in favor of the assured, and stand upon an entirely different footing from bonds, deeds and other instruments entered into after full considerations, and often under legel advice. This Court in the case of Bell vs. Bruen, 1 Howard 169, laid down the rule that commercial guarantees, which are usually written by merchants, are not subject to the strict rules of construction applied to bonds and contracts made directly between debtor and creditor. The rule as laid down has a much stronger application to the contract of insurance, which is usually entered into without the assured ever even reading the policy; relying on the good faith of the Company not to introduce conditions which would, in nine cases out of ten, defeat the policy. An unsuspecting farmer, who takes a policy from the Hartford Company, on his dwelling house, never dreams that the few ounces of saltpetre that

his wife may have in her closet, to use in curing meat and for medical purposes, vitiates the policy. Yet if the construction contended for by the Company is sustained, the smallest quantity of saltpetre kept in a dwelling, would vitiate the policy, and prevent his recovery in case of loss of his home from an accidental fire. We insist that a fair construction of the language of the policy would lead to no such monstrous result. It admits of a construction that does full justice to the insurer and the assured; and we insist that it is the duty of the Courts to adopt that construction which will give effect to the policy, and not that which, to use the mildest term, makes the policy in truth and in fact, a fraud and a delusion.

Had issue been taken on the 2d plea, it would not only have presented an issue of law to the jury, but under the construction contended for by the Company, proof that the smallest quantity of gunpowder kept for sporting or defensive, or medicinal purposes, or even a loaded gun or pistol kept by a watchman to defend the premises against burglars or incendiaries, would have sustained the issue. We feel the utmost confidence that this Court will sustain the action of the Court below, in not forcing defendants in Error to take issue on this plea.

In the motion for a new trial made by the Insurance Company (page 20 of printed record), counsel purport to set forth a portion of the charge giveto the jury by the Judge who tried the case below. This is simply *their construction of the charge, and not the charge itself.* No exception was taken on the trial to the charge of the Court to the jury, nor was any bill of exceptions tendered or signed. It is well settled that the only mode in which the instructions of the Court to the jury can be made a part of the record, is by a bill of exceptions. The Court cannot enquire into the correctness of the charge given the jury, unless it is made a part of the record and brought before them in the manner recognized by law, and the rules of this Court.

We remark, in conclusion, that the numerous pleas on which issue was taken, enabled the Company to present every legitimate defence that could arise on the policy. The Company have declined to embody the the testimony given on the tral in the record, and this Court is compelled to presume that they made the best defence of which they were capable.

After a careful examination of the pleadings, and giving due weight to the significant fact, that Plaintiffs in error declined to embody the testimony in the record, we are constrained to characterize the defence as baffling and vexations, and resorted to for the purpose of delay, or to extort a compromise.

We respectfully ask an affirmance of the judgment with damages.

W. P. HARRIS,
W. T. WITHERS.
For Defendants in Error.

Supreme Court of the United States.

The Phœnix Insurance Company, Plaintiff in Error,
No. 268. *vs.*
W. A. Slaughter and Jacob Stewart,
Late partners as W. A. Slaughter & Co.

Of December Term, in the Year of our Lord One Thousand Eight Hundred and Seventy.

And afterwards to-wit: On the first Monday of December of this same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the City of Washington, comes the said Phœnix Insurance Company, by their Attorney, and say that in the record and proceedings aforesaid there is manifest error in this:

1st. The Court erred in sustaining the demurrer of Defendant in Error to the third plea of Plaintiff in Error.

2d. The Court erred in over-ruling the motion of Plaintiff in Error for a new trial.

3rd. The Court erred in rendering a judgment for Defendant in Error.

JOHN D. FREEMAN,
For Plaintiff in Error.

In the Supreme Court of the United States.

October Term, A. D. 1871.

THE PHŒNIX INSURANCE CO., PLAINTIFFS.

No. 268. vs.

W. A. SLAUGHTER & CO., DEFENDANTS.

BRIEF FOR PLAINTIFFS IN ERROR.

This was an action of assumpsit on the policy of Insurance, made by Plaintiffs in Error in favor of Defendants in Error, whereby the goods, wares and merchandise of Defendants in Error were insured to the amount of $2,500.

There were nine pleas by Defendants below, all of which were disposed by issues of law and of fact, a trial by jury and a verdict for Defendants in Error, for the sum of $2472 59, on which judgment was rendered for Plaintiffs below.

From this judgment a writ of Error was taken and three Errors assigned which will be noticed in the order of assignment.

1st. The first assignment is that the Court erred in sustaining the demurrer of Defendant in Error to the third plea of Plaintiff in Error.

This plea sets up that the Defendants in Error, contrary to the terms and provisions of said Policy of Insurance sued upon, without the written permission in, or permission endorsed on said Policy of Insurance by said Plaintiffs in Error, did keep gunpowder on the premises, and in the said store-house described in said Policy of Insurance, where said goods so insured were kept."

By the fourth section of the conditions of the Policy of Insurance it is provided that "if *gunpowder*, phosphorus, saltetre,

naptha, benzine, benzine-varnish, benzole, petroleum, or crude earth oils are *kept on the premises*; or, if camphene, burning fluid, refined coal or earth oils are kept for sale, stored, or used on the premises in quantities *exceeding one barrel*, at any one time, without written permission in, or endorsed upon, this Policy, then and in every such case, this Policy *shall be void*."

The Court will perceive that there are two classes of articles enumerated—the first class, including *gunpowder*, is not to be kept on the premises at all, without permission in, or endorsed upon the Policy; the second class, beginning with "camphene," are not to be kept in quantities "*exceeding one barrel*, at any one time, without written permission," &c.

The two classes of articles are separated by a semi-colon, and the disjunctive conjunction "or," so that there can be no mistake as to the articles not to be kept in any quantity and those not to be kept in greater quantities than one barrel, without special permission, &c.

The Court below held that both classes of articles were included in the latter and that the former might be kept in quantities less than a barrel as well as the latter. In order that the Supreme Court may decide this question for itself, the original Policy of Insurance is enclosed with the record. There are two copies of the Policy in this record, viz: the one contained in the declaration itself at pages two to five, and another at pages seven to nine. The latter is incorrectly printed, in reference to the paragraphs above quoted. In the latter, the words between "naptha" and "burning fluid," to-wit: "benzine, benzine-varnish, benzole, petroleum, or crude earth oils *are kept on the premises*; or, if camphene" being left out of the Policy would sustain the judgment of the Court below; but being retained sustained the view taken by the Plaintiffs in Error. (See original Policy on file with the record.)

The Court will observe that the sentence beginning with gun powder and ending with "crude earth oils," and containing the first class of articles referred to, concludes with the words "*are kept on the premises*," while the second class of articles, beginning with "camphene," and ending with "refined coal or earth oils," concludes with the words, *are kept for sale, stored or used on the premises in quantities exceeding one barrel at any one time*." So that there

is no room left for doubt as to the true meaning of the terms of the policy in this respect, nor as to the distinction made between the two classes of articles referred to, to-wit: That the first class beginning with gunpowder are not to be kept on the premises in any quantity without special permission, while the second or latter class, beginning with "camphene," are not to be kept in quantities "exceeding one barrel at any one time."

The Plaintiffs below sued upon this Policy and made profert of it all; they are therefore bound by all it contains. They cannot select such parts as will sustain their claim and reject all others if opposed to them.

The Courts have invariably held that the entire Policy is the contract of Insurance, and is binding alike on the insurer and insured.

Where permission was given to keep twenty-five pounds of gunpowder, the Policy prohibiting the keeping of larger amount, *held* that the storing of a larger quantity, though only for a short time, and removed at the time the fire occurred, but before it reached the building of assured, avoided the policy. See **Faulkner** vs. Central Fire Ins. Co., of New Brunswick, 10 Kerr's Rep. New Brunswick, 279.

2nd. Having shown that the Court erred in this particular, it follows, that a new trial should have been granted, &c.

3rd. That judgment should not have been rendered for Plaintiffs below, but for Defendants below.

JOHN D. FREEMAN,

For Plaintiffs in Error.